81-1031

NO.

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1981

KAREN B. ET AL

Appellees

VERSUS

DAVID TREEN, ET AL

Appellants

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## JURISDICTIONAL STATEMENT

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
234 LOYOLA AVENUE
7TH FLOOR
NEW ORLEANS, LOUISIANA 70112
PHONE; (504) 568-5575

Attorneys for David Treen, Governor of the State of Louisiana

JACK A. GRANT
220 LAVOISIER STREET
GRETNA, LOUISIANA 70053

Attorney for the Jefferson Parish School Board And Larry T. Sisung

## Questions Presented By Appeal

I. Does the denial of use of public school facilities for voluntary prayer before the mandatory segment of the school day begins deny the rights to free speech, equal protection, and religious freedom to those who wish to participate?

II. This court has articulated a test for alleged violations of the establishment clause in two cases, *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) and *Lemon v. Kurtzman*, 403 U. S. 602 (1971). The test, commonly known as the *Waltz/Lemon* test, requires examination of three principle criteria:

1) whether the statute has a secular legislative purpose

2) whether the principal or primary effect of the statute is neither to advance nor inhibit religion; and,

3) whether the statute fosters an excessive government entanglement with religion

Is the *Waltz/Lemon* test the proper test to evaluate alleged violations of the establishment clause, and in particular, whether the use of public school facilities for voluntary prayer before the mandatory segment of the school day begins violates the Establishment Clause?

III. Would the use of public school facilities for voluntary

**prayer before the mandatory segment of the school day begins violate the Establishment Clause under the terms of the *Waltz/Lemon* test?**

## List of All Parties

I. Plaintiffs-appellees:

Karen B.
Leslie B.
Phyllis S.
David S.
Gary G.
Gregory G.
Jerome G.

II. Defendants-appellants:

David Treen
Larry Sisung
The Jefferson Parish School Board

III. Amici curiae:

The American Civil Liberties Union of Southern California Church State Project

Community Relations Committee of the Jewish Federation of Greater Nev Orleans

American Jewish Congress

Unitarian Universalist Association

Anti-Defamation League of B'nai B 'rith

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED BY APPEAL ..... i

LIST OF ALL PARTIES ..... iii

TABLE OF CONTENTS ..... iv

TABLE OF AUTHORITIES ..... v

OFFICIAL AND UNOFFICIAL REPORTS ..... 1

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED ..... 1

VERBATIM CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS ..... 2

STATEMENT OF THE CASE ..... 10

THE QUESTIONS ARE SUBSTANTIAL ..... 14

APPENDIX ..... A-1

# TABLE OF AUTHORITIES

Page

Constitutional Provisions

United States Constitution, Amendment I ..... 2
United States Consitution, Amendment XIV, cl.1&5 ..... 2

Statutes

28 U.S.C. § 1254(2) ..... 2
28 U.S.C. § 1343 ..... 1, 3
La.R.S. 17:2115 ..... 3

Ordinances and Regulations

Minutes of Jefferson Parish School Board Meeting dated December 3, 1980 ..... 4

Letter to Parents from Jefferson Parish School Board ..... 7

Cases

*Lemon v. Kurtzman*, 403 U.S. 602 (1971) ..... i, ii, 16

*School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) ..... 15

*Stone v. Graham*, ——U.S. ——, 49 L.W. 3369 (1980) ..... 20

*Thomas v. Review Board of Indiana Employment Security*, ——U.S. ——, 49 L.W. 4341 (1981) ..... 16

*Waltz v. Tax Commission of City of New York*, 397 U.S. 664 (1970) ..... i, ii, 18

*Wisconsin v. Yoder*, 406 U.S. 205 (1972) ..... 16

*Zorach v. Clauson*,
343 U.S. 306 (1952) .....15

*Karen B., et al v. David Treen, et al*,
653 F.2d 897 (5th Cir. 1981).....12

*Karen B., et al v. David Treen, et al*,
No.80-4774 (E.D. La. January 8, 1981) .....1

Others

*Bird, Freedom From Establishment and Unneutrality In Public School Instruction and Religion School Regulation*, Vol. II, Harvard Journal of Law and Public Policy, p. 125 (1979) .....19

THE COMPLETE JEFFERSON,
957 (S.Rasover ed. 1943).....21

E. CORWIN, CONSTITUTIONAL LIMITATIONS,
104 (1898).....20

## OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the United States Court of Appeals for the Fifth Circuit matter is found at 653 F.2d 897 (1981).

The opinion of the United States District Court for the Eastern District of Louisiana in this matter is unreported: *Karen B., et al v. David Treen, et al,* No. 80-4774 (E.D.La. January 8, 1981).

## STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

I. Parents of public school students sought declaratory and injunctive relief concerning Louisiana statute and derivative Jefferson Parish (County) School Board regulations which established guidelines for students who wished to meet before the mandatory segment of the school day for voluntary prayer. The statute and regulations were challenged as being violative of the First and Fourteenth Amendments. Jurisdiction of the federal courts was invoked by plaintiffs pursuant to 28 U.S.C. §1343.

II. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 5, 1981. There was no application for rehearing. Notice of appeal was filed in the Fifth Circuit on September 18, 1981.

III. Jurisdiction of this Court to hear an appeal from the decision of the Fifth Circuit is invoked pursuant to 28 U.S.C. §1254(2).

## VERBATIM CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, cl. 1 & 5:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

28 U.S.C. §1254(2) :

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented; . . ."

28 U.S.C. 1343:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

La.R.S. 17:2115:

> "A. Each parish and city school board in the states shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time of silent meditation, which shall not exceed five minutes. The brief time of silent meditation shall not be intended or identified as a religious exercise.
>
> B. A school board also may authorize the proper school authorities of each school under its jurisdiction to allow each classroom teacher to ask if a student wish-

es to volunteer to offer a prayer and, in the event no student does volunteer, to allow the teacher to offer a prayer. In no event shall any prayer last longer than five minutes. In no case may a student or a teacher be required to offer a prayer. Upon the objection of a student in the classroom or upon written objection of a parent or legal guardian of a student made to the principal or other proper school authority, that student shall not be required to participate or be present in the classroom during the time a prayer is being offered.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed."

Minutes of Meeting on December 3, 1980 of Jefferson Parish School Board and Parent Letter:

EXCERPT FROM THE MINUTES OF THE
JEFFERSON PARISH SCHOOL BOARD
MEETING HELD ON DECEMBER 3, 1980

Moved by Mr. Brainis, seconded by Mr. Speeg that the guidelines for student participation in prayer and silent meditation be as follows:

A. When supervision of students not participating in prayer is not considered a problem in the judgment of the school administrator, the following schedule will be implemented:
   1. The school day will begin at the regular time.

2. The first minute at the start of the day will be for prayer participants, excluding the students not wishing to participate. These students may report to class and remain seated and quiet or may remain outside the classroom where they will be supervised. Each classroom instructor will ask if any student wishes to volunteer to offer prayer, and, in the event no student does, the teacher may do so. Should the teacher choose not to volunteer a prayer, then the moment of silent meditation will be observed at this time. In any case, the period for a voluntary prayer to be offered will not last more than one minute.

3. After the minute of prayer, all students will report to class for a minute of silent meditation.

B. When supervision of students participating in prayer is considered a problem in the judgment of the school administrators, the following two options will be available for implementation:

Option 1

1. A centralized location will be established, when feasible, for prayer participants, starting the school day for them sufficiently early to allow students to arrive at the location and participate in a minute of prayer.

2. All students report to classrooms when regular bell rings and participate in minute of silent meditation.

Option 2

1. The bell will ring sufficiently early to allow prayer participants to report classrooms for a minute of prayer.

2. All students report to classrooms when regular bell rings and participate in minute of silent meditation.

The voting was as follows:

YEAS: Mr. Brainis, Mrs. Haynes, Mr. Speeg, Mr. Toomy, Mr. Verigan, Mrs. Clesi

NAYS: None

REPORTING LATE: Mrs. Hassenboehler and Mr. Valence

The motion carried.

CERTIFIED TO BE A TRUE COPY:

/S/ Lawrence J. Sisung, / AC

Lawrence J. Sisung, Secretary

Jefferson Parish Public School System
519 Huey P. Long Avenue
Gretna, Louisiana 70053

Dear Parent,

The Jefferson Parish School Board, at a meeting held on August 13, 1980 authorized and recommended that each principal in the system establish a moment of prayer and silent meditation at the begining of each school day as recently established by state law as follows:

A. Each parish and city school board in the State shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent meditation shall not be intended or identified as a religious exercise.

B. A school board also may authorize the proper authorities of each school under its jurisdiction to allow each classroom teacher to ask if a student wishes to volunteer to offer a prayer and, in the event no student does volunteer, to allow the teacher to offer a prayer. In no event shall any prayer last longer than five minutes. In no case may a student or a teacher be required to offer a prayer. Upon the objection of a student in the classroom or upon written objection of a parent or legal guardian of a student shall not be required to participate or be present in the classroom during the time a prayer is being offered.

In accordance with this policy, the Jefferson Parish School System will establish a one minute period of prayer and a one minute period of silent meditation as the first activity of the day at our schools. All students will participate in a minute of silent meditation, but those students who do not wish to participate or whose parents do not request then to participate in a moment of prayer will be excused from this activity.

Should you want your son / daughter to participate in prayer it will be necessary that you complete the form at the end of this letter and return it to his/her school by . However, if the student does not verbally request to participate, the student will not be allowed to participate.

| | | | |
|---|---|---|---|
| Joseph F. Toomy<br>District One | Andy Valence<br>District Three | Mrs. Gilda P. Haynes<br>District Five | Leon I. Brainis<br>District Seven |
| Donalyn Hassenboehler | Georgia L. Clesi | Raymond D. Speeg | Terry Verigan |

Without signed parental request and a verbal student request, no student will be included in this acitivity.

Your cooperation and that of all parents is, always, greatly appreciated.

Respectfully,

Larry J. Sisung
Superintendent

LJS/nr

---

If you desire to have your son/daughter avail himself/herself of the opportunity to participate in a moment of prayer please check below and return to the school by

_____ I want my son/daughter_____
_____to participate in a moment of prayer.

Date ———— Parent's Signature————

## STATEMENT OF THE CASE

*Karen B.* presents a unique fact setting not previously addressed by this Court. All previous cases on prayer considered by the Court have dealt with fact situations that

> a) tended to establish the Judeo-Christian line of religious thought *and*
> b) required a child to profess his faith or lack thereof by seeking excusal from a mandatory segment of the student curriculum.

However, the Louisiana Legislature passed, and the Jefferson Parish School Board implemented, a law which allows interested students and teachers to meet on school property on a voluntary basis for one minute before the mandatory portion of the school day and exchange a "prayer" for the day. Students who wish to participate must present a signed consent form and make an oral request to be included. Students who do not wish to participate may sit in the classroom during the time involved or report to an alternate location to await the beginning of the mandatory portion of the school day. The "prayer" may be sectarian or nonsectarian, religious or non-religious, and is composed or selected entirely by the individual speaking that day.

Parents of students sought declaratory and injunctive relief from the Louisiana statute and the derivative Jefferson Parish School Board regulations. They contended that the statute and regulations offended the First Amendment prohibition regarding the enactment of laws respecting the establishment of religion.

The district court issued judgment dismissing the plaintiff's suit and declared the statute and its proposed implementation by Jefferson Parish to be constitutional, but issued an injunction pending appeal in order to maintain the status quo.

The Court of Appeals reversed, with Allen Sharp, District Judge for the Northern District of Indiana, sitting by designation, filing a dissenting opinion. The Fifth Circuit found the statute and proposed implementation to be unconstitutional, and remanded the case for proceedings not inconsistent with their opinion.

Notice of appeal was filed on September 18, 1981 by David Treen, Governor of Louisiana, et al.

Question I: "Does the denial of use of public school facilities for voluntary prayer before the mandatory segment of the school days begins deny the rights to free speech, equal protection, and religious freedom to those who wish to participate?" was raised at both the trial and the appellate court level in the context of hostility towards religion. It was first raised in the trial court in defendants' pre-trial memorandum[1] and was argued at trial. The district court agreed with defendants saying,

---

1. The time elapsed from the filing of the complaint until the trial was only 13 days. There was very little activity in the case in between.

> "To hold that this statute, as it is to be implemented in Jefferson Parish, is unconstitutional would be to hold, in effect, that the United States Constitution forbids any prayer whatsoever in a public school, and indeed, in any public place or at any state function. In my view, to hold that the Constitution so forbids prayer is to say that the Constitution espouses non-prayer or that it is hostile to prayer.
>
> If the Constitution prohibits those who believe in prayer from praying a prayer (not the state-elected prayer), a prayer volunteered by different students or by a teacher in a public school, then the Constitution impliedly teaches children that there is something wrong with prayer." Reasons for Judgment, Appendix, p. B-11 (hereinafter R. J., A., p. ___ .)

The same issue was raised in the appellate court briefs and oral argument. The Fifth Circuit disagreed with the district court and found that such a denial of use of public facilities did not evidence a hostility to religion. Judge Sharp wrote a dissenting opinion because he "shared the district court's concern that this decision will be received as projecting a government hostility toward religion, "*Karen B., et al v. David Treen, et al.* 653 F.2d 897, 903 (5th Cir. 1981) (JUDGE SHARP, dissenting).

Question II: "Is the *Waltz/Lemon* test the proper test to evaluate alleged violations of the Establishment Clause, and in particular whether the use of public school facilities for voluntary prayer before the mandatory portion of the school day begins violates the Establishment Clause?" was not raised at the district or appellate court level because both of those courts were bound to follow the *Waltz/Lemon* test and had no authority to change the test.

Question III: "Would the use of public school facilities for voluntary prayer before the mandatory segment of the school day begins violate the Establishment Clause under the terms of the *Waltz/Lemon* test?" was specifically raised at both the district and appellate court levels. It was first raised in the trial court in defendants' pre-trial memorandum and was argued at trial. It was raised in the Fifth Circuit in briefs and was treated extensively in oral argument.

The district court ruled that the statute and proposed implementation passed the *Waltz/Lemon* test:

> "In the absence of any controlling precedent, we apply the rationale of the Supreme Court in its dispostion of cases involving the Establishment Clause. A three-part test for determining and constitutionality of state laws under the Establishment Clause has been articulated. The statute must have a secular legislative purpose; its principal or primary effect must not advance or inhibit religion; and the statute must not foster excessive government entalnglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Stone v. Graham*, 49 L.W. 3369 (1980).
>
> The testimony of two legislators who were primarily responsible for the state statute and a school board member who sponsored the implementation resolution in Jefferson Parish stressed that the purpose behind the program is to provide a mechanism by which children could learn about beliefs different from their own, focus on spiritual aspects of human nature, and thereby develop an increased regard for themselves and their peers. The neutral, non-denominational nature of the proposed program was emphasized as proof of its secular purpose.
>
> The court finds that the program proposed by Jefferson Parish does not promote or inhibit religion. The students and the teacher have the opportunity to give a 'prayer' in the one minute provided. That 'prayer' can

> relate to anything from sports to the weather to religion; the student or teacher who volunteers is merely given the opportunity to say something for one minute on any topic. It may relate to religion, but it also may be non-religious.
>
> Finally the totally neutral and voluntary nature of the proposed prayer program prevents any possibility of government entanglement in religion. The affirmative steps which the parents and the children must take before the children will be permitted to participate in the program neutralize any appearance of government influence."

The Fifth Circuit reversed and held that the Louisiana statute and its proposed implementation violate the three part test. Judge Sharp in his dissent found that

> "The challenged legislation satisfies all of the three criteria of the Establishment Clause. The legislative purpose of the challenged program was to provide religious freedom, a purpose no more religious than the First Amendment. Furthermore, the challenged legislation has the primary effect of advancing not religion, but religious freedom. And it does so without excessive governmental entanglement with religion." *Karen B., supra*, at 903-04 (JUDGE SHARP dissenting).

## THE QUESTIONS ARE SUBSTANTIAL

### INTRODUCTION

Appellants propose to allow all children who so desire to meet before the start of the mandatory school day to exchange a prayer. One child each day would offer a one-minute prayer

of his own selection or composition thereby presenting the participating children with an exposure to a variety of viewpoints and beliefs.

The district court judge thought the proposal so neutral, so harmless, that to disallow it would be to evidence governmental hostility to religion. R.J., A., p. B-11. The dissenting judge on the Fifth Circuit panel not only thought it was neutral and harmless, he thought that the program was designed to provide religious freedom. *Karen B., supra,* at 903 (JUDGE SHARP dissenting). The two majority judges on the panel thought, on the otherhand, that the program,"offended the First Amendement proscription against enactment of laws respecting the establishment of religion." *Karen B., supra,* at 899.

Defendants respectfully contend that although there should be no establishment of religion, although government must take care that the "majority does not use the machinery of the State to practice its beliefs" *School District of Abington Township v. Schempp,* 374 U.S. 203, 225-6 (1963), the time has come when there must be an "accommodation" of the kind envisioned by *Zorach v. Clauson,* 343 U.S. 306 (1952).

An examination of the interplay between the rights of some people to religious freedom and others to freedom from establishment of religion must not and cannot be rigid. Rather, "the constitutional line of separation between church and state,' far from being a "wall", is a blurred indistinct, and variable barrier depending on all the circumstances of a particular relationship".

*Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Karen B. supra*, at 903 (JUDGE SHARP dissenting). So too in this instance the Court must examine the rights of *all* parties to determine if *anyone's* rights are being infringed.

## I. DOES THE DENIAL OF USE OF PUBLIC SCHOOL FACILITIES FOR VOLUNTARY PRAYER BEFORE THE MANDATORY SEGMENT OF THE SCHOOL DAY BEGINS DENY THE RIGHTS TO FREE SPEECH, EQUAL PROTECTION, AND RELIGIOUS FREEDOM TO THOSE WHO WISH TO PARTICIPATE?

The right to free exercise of religion is, of course, a fundamental constitutional right and its denial under any circumstances is subject to strict scrutiny.

> "The essence of all that has been said and written on the subject is that only those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Thomas v. Review Board of Indiana Employment Security*, —— U.S. —, ——, 49 L.W. 4341, 4344 (1981). (Emphasis added)

Unless there is a compelling state interest, every person is entitled to the free exercise of religion. Defendants admit that there is a compelling state interest in protecting the right of freedom from establishment of religion. However, defendants *must* point out that the *Yoder* court provided not a one, but a two-part test: 1) a compelling government interest *and* 2) that the interest be *"not otherwise served"*, *Yoder, supra*, at 215 (Emphasis added).

In the case at bar, the interest in protection from establishment of religion *is* "otherwise served". The State and School Board have gone to elaborate lengths in composing the program to make sure that the interests of freedom of exercise and freedom from establishment are protected at the same time. There is no reason to curtail the right to free exercise of religion when it does not infringe on the establishment of religion. It stretches credulity beyond the breaking point when plaintiffs argue that the State is establishing religion by merely allowing those children who wish to pray, to exercise their right to freedom of religion, to use a classroom before school starts.

Further, under the Fourteenth Amendment *all* people are entitled to the free exercise of their religion on an equal basis. However, as Judge Sharp pointed out in his dissent, the declaration by the Fifth Circuit that this plan is unconstitutional does not provide an equal opportunity for the free exercise of religion by all students.

> "School attendance is, after all, compulsory in Louisiana. Compulsory school attendance forces many students into public schools, thereby unavoidably curtailing their freedom to engage in religious exercises. For Louisiana to reduce its restraint on student's religious freedom is perfectly legitimate.
>
> If a student's religion required him or her to utter an audible prayer at the beginning of each school day, the Free Exercise Clause would require the school to accommodate that requirement. Unfortunately for the students who would have participated in the program in this case, their religion did not require them to utter such an audible prayer, even though their religion

> apparently encouraged it sufficiently for their parents to petition the state legislature to provide for the allowance of such an audible prayer. I do not read the Establishment Clause to prohibit all audible public school prayer which the Free Exercise Clause does not protect. '[I]t is hardly impermissible for Congress to attempt to accommodate free exercise values in line with "our happy tradition" of avoiding unnecessary clashes with the dictates of conscience." ' *Gillette v. United States*, 401 U.S. 437, 453, 91 S.Ct. 828, 838, 28 L.Ed.2d 168 (1971). 'The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.' *Walz v. Tax Commission of New York*, 397 U.S. 664, 673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970)." *Karen B., supra*, at 904 (JUDGE SHARP dissenting).

Appellants urge that those people whose religion requires them to utter an audible prayer should not be accorded more rights than those whose religion merely encourges one. Appellants further urge that those people who are interested in particitpating in the beneficial, but hardly constitutionally protected, activities of a sport or glee club or chess exhibition should not have a greater right to the use of *public* school facitities, including a faculty advisor, than those who wish to take advantage of their constitutionally protected right to the free exercise of religion.

To allow a preference for those who wish to partake of rights not protected by the Constitution over those whose rights are protected by the Constitution or to give preference to one constitutionally protected right over another when both may be accommodated is certainly to, in the words of the trial judge, "evidence a hostility towards religion." R.J., A., B-10.

## II. IS THE WALTZ/LEMON TEST THE PROPER TEST TO EVALUATE ALLEGED VIOLATIONS OF THE ESTABLISHMENT CLAUSE, AND IN PARTICULAR, WHETHER THE USE OF PUBLIC SCHOOL FACILITIES FOR VOLUNTARY PRAYER BEFORE THE MANDATORY SEGMENT OF THE SCHOOL DAY BEGINS VIOLATES THE ESTABLISHMENT CLAUSE?

The State of Louisiana and the Jeffereson Parish School Board respectfully request that this Court re-examine the three-part test set up by the Court to determine establishment clause violations, commonly known as the *Waltz/Lemon* test. The Establishment Clause has been made unique by this Court in that it has its own test to determine violations of First Amendment freedoms. All the other freedoms guaranteed by the First Amendment are analyzed under the following test:

1) protected interest of the particular freedom,
2) significant governmental burden on the protected exercise, and
3) no compelling state interest to justify the governmental restraint." Bird, *Freedom From Establishment and Uneutrality in Public School Instruction and Religious School Regulation*, Vol. II, Harvard Journal of Law and Public Policy, p. 125, 130, (1979), (hereinafter cited as Bird).

Why are the rights and the corresponding alleged infringements under the Establishment Clause subjected to a stricter scrutiny than any other First Amendment freedom? The First Amendment as written does not state or imply in any way that one freedom is greater than another. It is submitted that the *Waltz/Lemon* test was formulated, albeit with the best of intentions, due to an incorrect historical analysis.

Both the Establishment Clause and the Free Exercise Clause were written to guarantee religious freedom. This Court has articulated a policy that imposes the Jeffersonian "wall of separation" upon the Establishment Clause. Yet, Jefferson was not even the author of the Establishment Clause. In fact, Jefferson did not propound his theory of a "wall of separation" until 1802, eleven years after the Establishment Clause was adopted.[2]

It is internally inconsistent for the Court to say in *Stone v. Graham*, —— U.S. ——, 49 L.W. 3369 (1980), that one may not look to the "avowed secular purpose" of a statute and at the same time to say that the plain content of the words of the Establishment Clause were not all that was intented; to say that, rather, one should look to the avowed intent one of the Framers of the Constitution who did not even author the Establishment Clause.

If the courts may not look beyond the plain meaning of statutes as written which are alleged to violate the Establishment Clause, it does not follow that the courts should then look beyond the plain meaning of the Establishment Clause to what Jefferson avowed that it meant. The Clause is extremely clear and "refered to creation of a national church or financial and legal preference for one ecclesiastical institution over other

---

2. E. CORWIN, CONSITUTIONAL LIMITATIONS, 104, 105-06 (1898).

churches." Bird, *supra*, at 128.[3]

Even assuming arguendo that one should take Jefferson's views into consideration, it is hard to believe that he intended the wall of separation to be quite so high or so wide as the *Waltz/Lemon* test would indicate, since he "advocated religious instruction in public schools". Bird, *supra*, footnote 12 at p. 128[4].

As Mr. Bird suggests

> "While the focuses of the establishment and the free exercise clauses differ to some extent their purposes are the same and so their construction should be similar. The focus of the establishment clause is prohibiting governmental advancement or disadvantagement of any religion through unjustifiably institutionalizing or discriminatorily benefiting it or a different faith, while that of the free exercise clause is prohibiting governmental interference with any religious exercise through unjustifiably burdening it. But the common purpose of both religion clauses is protecting religious liberty. Because this comprehensive purpose is accomplished in two aspects by the religion clauses, a uniform approach to judicial construction should be employed so that neither religion clause will override the other.
> The general requirements for a successful establishment clause claim, to have a parallel approach to the free exercise clause and other First Amendment clauses, should be (1) a religion within the First Amendment meaning,

---

3. Citing T. Cooley, The General Principles of Constitutional Law 224 (3d.ed. 1898); The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L. J. 65, 85-87 (1962);1 Annals of Congress 730-31 (1789-91); E. Corwin, Constitutional Limitations 101 (1898).
4. The Complete Jefferson 957-58 (S. Radover ed. 1943).

> (2) substantial governmental unneutrality toward that covered religion, whether by advancement or by disadvantagement, and (3) no compelling interest to justify that governmental unneutrality... Bird, *supra*, at 132-33.

The School Board's proposed program, of course, would withstand a constitutional challenge under Bird's test, for no particular religion is favored as is necessary to the first requirement of the test. However even if one assumes that "religion" encompasses all religions as opposed to non-belief, an attack on the Louisiana statute and School Board regulations would still be unsuccessful. Appellees cannot meet the second requirement of the test, unneutrality.

There is no unneutrality because the program sets up a system so that all parties are given an opportunity to exercise their religious freedom as they see fit at the same time. Those who choose to take advantage of the rights to free exercise may; while those who do not wish to are not subjected to a religious program in which they do not desire to take part. Rather, as the district court judge noted, they are required to "opt-in" if they wish to participate. R.J., A., p. B-10.

It is submitted that this new test as outlined by Mr. Bird was, although not articulated by the Court, at the heart of the *Zorach* accommodation decision. Accommodation is what not only this case is about, but what every court analysis of a free exercise and/or establishment case should be about: A balancing of the fundamental rights of competing groups, an accomodation

allowing free exercise and freedom from establishment to coexist.[5]

## III. WOULD THE USE OF PUBLIC SCHOOL FACILITIES FOR VOLUNTARY PRAYER AT THE BEGINNING OF THE SCHOOL DAY VIOLATE THE ESTABLISHMENT CLAUSE UNDER THE TERMS OF THE WALTZ /LEMON TEST?

The State of Louisiana and the Jefferson Parish School Board cannot emphasize strongly enough that now is the time for this Court to step back and review its test for alleged Establishment Clause violations. However, even if the Court chooses not to do so at this time, there can be no doubt that the program at issue in the case at bar does not violate the Establishment Clause even under the overly-inclusive *Waltz/Lemon* test.

> "This would be a simple case if there were a controlling precedent either in the United States Supreme Court or in the Fifth Circiut, . . . I have found no such precedent." R.J., A.,p.B-6.

With these words District Judge Adrian Duplantier set the stage for the case before the court. No ruling of this Court has addressed the issues currently at bar. Each of the establishment cases considered by the Court in recent times has presented a scenario in which the State selected a certain line of Judeo-Christian religious thought which was imposed on school age

---

5. For further details on this type of anlaylsis, see Bird *supra*, at 125-42, 153-54.

children through the mechanism of compulsory school attendance. These are not even remotely applicable to the case at bar. The uniqueness of *Karen B.* arises from the following factors

1) The "prayers" involved are neither selected, written, or designed by government, but rather are composed or chosen by students. They may be of *any* sect or of the child's own composing. In fact they need not necessarily even be a "prayer" within the religious definition of that word.
2) There is *no* compulsion upon the children to attend the session. Instead the children must voluntarily leave the playground or hall one minute early in order to participate.[6] It is hard to imagine a situation less coercive, because it is hard to imagine a school situation which children would be less willing to leave than pre-school play.

The district court found that not only was *Karen B.* unique on its facts, that not only did its facts serve to distinguish *Karen B.* from the previous decisions of this court on prayer, but that these same facts necessitated a decision that the *Karen B.* program passed the three part *Waltz/Lemon* establishment test.

---

6. Excerpt from Minutes of the Jefferson Parish School Board Meeting held on December 3, 1980, Appendix, p. B-14.

> "The testimony of two legislators who were primarily responsible for the state statute and a school board member who sponsored the implementation resolution in Jefferson Parish stressed that the purpose behind the program is to provide a mechanism by which children could learn about beliefs different from their own, focus on spiritual aspects of human nature, and thereby develop an increased regard for themselves and their peers. The neutral, non-denominational nature of the proposed program was emphasized a proof of its secular purpose.
>
> The court finds that the program proposed by Jefferson Parish does not promote or inhibit religion. The students or teacher who volunteers is merely given the opportunity to say something for one minute on any topic. It may relate to religion, but it also may be nonreligious.
>
> Finally the totally neutral and voluntary nature of the proposed prayer program prevents any possibility of government entanglement in religion. The affirmative steps which the parents and the children must take before the children will be permitted to participate in the program neutralize any appearance of government influence." R.J., A.,p. B-9.

Judge Sharp, dissenting from the Fifth Circuit's finding of establishment, analyzed the proposed program in a different way.

> "It seems clear to me that the purpose behind the challenged legislation was to provide students with the freedom to engage in a religious exercise, opening their school day with an audible prayer. But it seems to me that this is a perfectly legitimate, secular purpose. Providing the freedom to engage in religious exercises is the purpose of the Free Exercise Clause of the First Amendment. It can surely not be argued that the First Amendment has a religious purpose. The purpose of the challenged legislation is to provide students with a small portion of the religious freedom which they are guaranteed outside the classroom. " *Karen B.*

*supra*, at 904 (JUDGE SHARP dissenting).

> "Nor does it seem to me that this legislation violates the second criterion of the Establishment Clause. The primary effect of the challenged legislation is neither to advance nor inhibit religion, but rather to advance religious freedom . . . where the legislatively created program is both voluntary and without substantive content, it can have the primary effect of advancing neither a state religion nor religion in general, but religious freedom." *Karen B., supra*, at 904, 906 (JUDGE SHARP dissenting).

> "Finally, this legislation does not violate the third criterion of the Establishment Clause. The government entanglement with religion which is fostered by the challenged legislation is hardly excessive; it is de minimus. The program established by the challenged legislation is necessarily conducted on public school property, but the amount of time involved does not materially affect the educational function of the school. The state limits the time period to five minutes, and Jefferson Parish limits the time period to one minute. School officials' monitoring of the program to guarantee voluntariness, to enforce time limitations, and to choose among student volunteers simply does not raise the level of the government's entanglement to 'excessive'." *Karen B., supra*, at 906 (JUDGE SHARP dissenting).

The trial judge and the Fifth Circuit dissenting judge are merely using different language to describe the same result. A review of the Karen B. program in terms of the *Waltz/Lemon* test must lead this Court to the inescapable conclusion that the challenged legislation is simply a *Zorach* "accommodation". The State of Louisiana and the Jefferson Parish School Board have carefully tailored the proposal to allow freedom of religious expression. At the same time they have provided safeguards to ensure tha religious freedom is protected for *all* students. *There is no establishment of religion here.*

## CONCLUSION

This is not a case where the State is seeking to establish Judeo-Christian religion. This is not a case where a child is required to profess his faith or lack thereof by seeking excusal from a mandatory segment of the student curriculum. This is a case where the State is seeking to provide religious freedom permitting religious expression guaranteed by the Constitution to those who so desire while protecting the rights of others to freedom from establishment of religion.

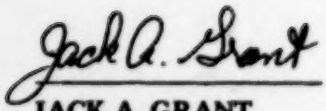
This Court must not prefer one religious freedom over another. Competing interests must be balanced. This Court must protect the rights to free speech, equal protection and free exercise of religion guaranteed under the First Amendment to the students who wish to participate in the Jefferson Parish program. These rights may be abridged only if there is a compelling government interest needful of protection. The only such interest which has been raised is whether the *Karen B.* program establishes religion.

Appellants respectfully submit that now is the time for the Court to reexamine its establishment test for that test is unconstitutional in and of itself in that it affords greater protection to one type of First Amendment freedom than another. However, even an analysis of the program under the current *Waltz/Lemon* test shows that there is no such establishment and thus no compelling government interest which would merit abridging the free exercise rights of the public school students of Louisiana.

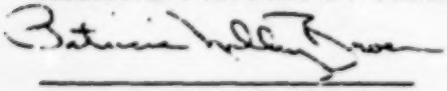
Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL



JACK A. GRANT
ATTORNEY FOR
THE JEFFERSON
PARISH SCHOOL
BOARD AND
LARRY T. SISUNG
220 LAVOISIER STREET
GRETNA, LOUISIANA
70053
TELEPHONE:
(504)368-7888



PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF
JUSTICE
234 LOYOLA AVENUE
7TH FLOOR
NEW ORLEANS, LOUISIANA
70112
PHONE: (504)568-5575

KAREN B., et al., Plaintiffs-Appellants,

v.

David TREEN, et al,

Defendants-Appellees.

No. 80-4003.

United States Court of Appeals,

Fifth Circuit.

Unit A

Aug. 5, 1981.

Parents of public school students sought declaratory and injunctive relief concerning Louisiana statute and derivative Jefferson Parish School Board regulations which established guidelines for student participation in prayer at school. The United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., denied relief, and parents appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that Louisiana, statute and Jefferson Parish regulation permitting student and teacher prayers in public schools violated First Amendment where statute authorized teachers to inquire whether any student wished to offer a prayer and, if no student volunteered permitted teachers to pray, notwithstanding that no student or teacher was compelled to pray or that under Parish regulations any student who desired to participate in a minute of prayer was required to submit express written permission of his parents and make a verbal request to join in the exercise.

Reversed and Remanded.

Allen Sharp, District Judge for the Northern District of Indiana, sitting by designation, filed dissenting opinion.

---

Carole B. Shauffer, New Orleans, La., Mark Franklin Terry, Sacramento, Cal., for plaintiffs-appellants.

Helen S. Kohlman, Jonathan M. Lake, New Orleans, La., for Jewish Federation of Greater New Orleans.

Donald R. Mintz, Leopold Z. Sher, New Orleans, La., for Anti-Defamation League of B'Nai B'Rith.

Nathan Z. Dershowitz, New York City, William B. Duffy, Jr., Boston, Mass., for American Jewish Congress & the Unitarian Universalist Assn.

Patricia Bowers, New Orleans, La., for Treen.

Jack A. Grant, Gretna, La., for Jefferson Parish School Bd., and Larry T. Sisung.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHARLES CLARK and RANDALL, Circuit Judges,

KAREN B., et al., Plaintiffs-Appellants,

v.

David TREEN, et al,

Defendants-Appellees.

No. 80-4003.

United States Court of Appeals,

Fifth Circuit.

Unit A

Aug. 5, 1981.

Parents of public school students sought declaratory and injunctive relief concerning Louisiana statute and derivative Jefferson Parish School Board regulations which established guidelines for student participation in prayer at school. The United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., denied relief, and parents appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that Louisiana, statute and Jefferson Parish regulation permitting student and teacher prayers in public schools violated First Amendment where statute authorized teachers to inquire whether any student wished to offer a prayer and, if no student volunteered permitted teachers to pray, notwithstanding that no student or teacher was compelled to pray or that under Parish regulations any student who desired to participate in a minute of prayer was required to submit express written permission of his parents and make a verbal request to join in the exercise.

Reversed and Remanded.

Allen Sharp, District Judge for the Northern District of Indiana, sitting by designation, filed dissenting opinion.

---

Carole B. Shauffer, New Orleans, La., Mark Franklin Terry, Sacramento, Cal., for plaintiffs-appellants.

Helen S. Kohlman, Jonathan M. Lake, New Orleans, La., for Jewish Federation of Greater New Orleans.

Donald R. Mintz, Leopold Z. Sher, New Orleans, La., for Anti-Defamation League of B'Nai B'Rith.

Nathan Z. Dershowitz, New York City, William B. Duffy, Jr., Boston, Mass., for American Jewish Congress & the Unitarian Universalist Assn.

Patricia Bowers, New Orleans, La., for Treen.

Jack A. Grant, Gretna, La., for Jefferson Parish School Bd., and Larry T. Sisung.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHARLES CLARK and RANDALL, Circuit Judges,

and SHARP*, District Judge.

CHARLES CLARK, Circuit Judge:

Parents of students were denied declaratory and injunctive relief from the Louisiana statute and derivative Jefferson Parish School Board regulations which establish guidelines for student participation in prayer at school. They contend that the statute and regulations offend the First Amendment proscription against enactment of laws respecting the establishment of religion. We agree and reverse the district court.

I.

Louisiana Revised Statutes § 17:2115 (1981) has two components. Subsection A provides that each parish and city school board shall permit the appropriate local school authorities to allow those students and teachers who so desire to observe a brief period of silent meditation at the beginning of each school day. The statute expressly declares that this observance can neither be intended or identified as a religious exercise. The plaintiffs have no quarrel with the silent meditation provision of the statute, and it is not involved in this litigation.

The challenged provision, subsection B, is essentially enabling legislation. It provides that a school board may authorize the

---

* District Judge for the Northern District of Indiana, sitting by designation.

appropriate school officials to allow each classroom teacher to ask whether any student wishes to offer a prayer and, if no student volunteers, to permit the teacher to pray. The statute limits any prayer offered to no longer than five minutes and provides that no student or teacher may be compelled to pray. In the event a student in the classroom objects or the student's parents or legal guardian objects in writing to the proper school authority, subsection B provides that the student may not be required to participate or to be present during the time prayer is being offered. *See* La. Rev. Stat. § 17:2115(B) (1981).

The Jefferson Parish School Board has adopted a resolution establishing guidelines to implement section 17:2115(B) in parish schools. These guidelines provide that each school day will begin at the regular time with a minute of prayer followed by a minute of silent meditation. Under the school board guidelines, each teacher must ask if any student wishes to volunteer a prayer, and, if no student wishes to do so, the teacher may offer a prayer of his own. If the teacher elects not to pray, then the period of silent meditation would be observed immediately. The school board guidelines provide that no prayer may be longer than one minute in duration.

Jefferson Parish has also made elaborate provisions for excusing students who do not want to participate in the prayer portion of the morning exercises. According to a school board letter explaining the program to parents, any student who desires to participate in the minute of prayer must submit the ex-

press written permission of his parents and make a verbal request to join in the exercise. Students without this permission may either report to class, where they must remain seated and quiet throughout the morning exercises, or remain outside the classroom under other supervision. The school board guidelines also establishes two alternative methods for dealing with the supervision of non-participating students. After the minute of prayer has been completed, all students must report to the classroom for a minute of silent meditation.

After hearing testimony and argument, the district court held that section 17:2115(B) and the parish implementing regulations do not offend the Constitution but issued an injunction pending appeal in order to maintain the status quo.

II.

[1, 2] The Establishment Clause of the First Amendment prohibits Congress and the states from enacting any law "respecting an establishment of religion." U.S. Const. Amendment I. *See Everson v. Board of Education*, 330 U.S. 1, 15–16, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947). In *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), the Supreme Court held that daily classroom recitation of a denominationally neutral, state-composed prayer violates the Establishment Clause even though students could be excused from participa-

tion. The following year, the Court held that daily Bible reading and class recitation of the Lord's Prayer also offends the Constitution, even though individual students were free not to attend the morning exercises. *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed2d 844 (1963). Since that time, the Supreme Court has examined three principal criteria to determine whether a state legislative enactment comports with the Establishment Clause: (1) whether the statute has a secular legislative purpose, (2) whether the principal or primary effect of the statute is neither to advance nor to inhibit religion, and (3) whether the statute fosters "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S.CT. 2105, 2111, 29 L. Ed.2d 745, 755 (1971). *See Stone v. Graham*, —— U.S. ——, ——, 101 S.Ct. 192, 193, 66 L.Ed.2d 199, 201 (1980); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 652, 100 S.Ct. 840, 846, L.Ed.2d 94, 101 (1980); *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 748, 96 S.Ct. 2337, 2348, 49 L.Ed.2d 179, 188 (1976). If a statute fails to satisfy any one of these three tests, it will not survive a constitutional attack brought under the Establishment Clause. *Stone v. Graham*, ——U.S. at ——, 101 S.Ct. , at 193, 66 L.Ed.2d at 201. Applying these settled principles of constitutional jurisprudence, we hold that the Louisiana statute and Jefferson Parish regulations permitting student and teacher prayers in the public schools violate the First Amendment.

First the district court found that section 17:2115(B) and

the implementing regulations had a secular legislative purpose. It reaches this conclusion relying upon the testimony of two state legislators who were primarily responsible for enactment of statute and the school board member who sponsored the implementing resolution in Jefferson Parish. These witnesses stated that the purpose of the school prayer program was to increase religious tolerance by exposing school children to beliefs different from their own and to develop in students a greater esteem for themselves and others by enhancing their awareness of the spiritual dimensions of human nature.

[3] Under the decisions of the Supreme Court, however, this testimonial avowal of secular legislative purpose is not sufficient to avoid conflict with the Establishment Clause. In *Stone v. Graham, supra,* the Court struck down a Kentucky statute requiring a copy of the Ten Commandments purchased with private contributions, to be displayed on the wall of each public classroom. The Kentucky legislature has expressly required that each posted copy bear the following legend: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." —— U.S. at ——, 101 S.Ct., at 193, 66 L.Ed.2d at 201 (citations omitted.) Nevertheless, the Court held the statute unconstitutional.

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments is undeniably a religious text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to

that fact.

Id. at ——, 101 S.Ct. at 194, 66 L.Ed.2d at 202 (footnote omitted). *See Schempp,* 374 U.S. at –24, 83 S.Ct. at 1572, 10 L.Ed.2d at 859.

[4] Similarly, the plain language of section 17:2115(B) of the Jefferson Parish guidelines makes apparent their predominantly religious purpose. Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people. Indeed, since prayer is a primary religious activity in itself, its observance in public school classroom has, if anything, a more obiviously religious purpose then merely displaying a copy of a religious text in the classroom. Even if the avowed objective of the legislature and school board is not itself strictly religious, it is sought to be achieved through the observance of an intrinsically religious practice. The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests. See Schempp, 374, U.S. at 224, 83 S.Ct. at 1572, 10 L.Ed.2d at 859. Furthermore, the legislature's provision for excusing students who do not desire to participate in the daily prayer session betrays its recognition of the fundamentally religious character of the exercise. Id.

---

Nevertheless, the defendants urge that this case is distinguishable from Stone and Schempp because the district court had before it the live testimony of the legislators and school board member who sponsored the prayer program. They do

not explain, however, how the personal asseverations of individual legislators can be more compelling than the expression of secular intent actually embodied in the statute. In fact, the personal testimony of individual proponents, given in court after enactment of the statute, is far less persuasive, since it reflects only the partial perspectives of those legislators and not the collective intention of the entire legislative body. Neither such testimony nor the words of the enactment is sufficient to overcome the obvious religious means employed by the statute. Therefore, La.Rev.Stat. 17:2115(B) violates the first prong of the test.

[5] Second, the district court held that section 17:2115(B) and the Jefferson Parish program do not inhibit or promote religion. This conclusion was predicated upon the judge's conviction that the prayer offered by a student or by a teacher could very well comprehend some secular objective. Thus, the district court asserted that the prayers could "relate to anything from sports to the weather to religion."

This analysis is disingenuous. Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise. Section 17:2115(B) and the parish implementing guidelines promote religion by encouraging observance of a religious ritual in the classroom.

[6] The defendants contend that the challenged statute and regulations are not constitutionally infirm because they are entirely content-neutral and because student participation in the daily prayer is purely voluntary. Neither of these features cures the consitutional defect.

[7] That the challenged provisions do not prescribe any particular form of prayer and do not promote some sectarian religious practice is without constitutional significance. The Supreme Court consistently has expressed the view that the First Amendment demands absolute governmental neutrality with respect to religion, neither advancing nor inhibiting any particular religious belief or practice and neither encouraging nor discouraging religious belief or unbelief. Thus, the Court could say,

> It is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion" and even though it does not aid one religion more than another but merely benefits all religions alike.

*Committee for Public Education v. Nyquist*, 413 U.S. 756, 771, 93 S.Ct. 2955, 2964–65, 37 L.Ed.2d 948, 962 (1973). *See Engel*, 370 U.S. at 430, 82 S.Ct. at 1266–67, 8 L.Ed.2d at 607; *McCollum v. Board of Education*, 333 U.S. 203, 210-11, 68 S.Ct. 461, 464-65, 92 L.Ed. 649, 658 (1948); *Everson*, 330 U.S. at 15-16, 67 S.Ct. at 511, 91 L.Ed. at 723.

[8] State and school officials point out that student participation in the daily prayer session is allowed to be wholly voluntary. This fact is not relevant to the Establishment Clause in-

quiry. As the Supreme Court said in *Engel*, "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause . . . ." 370 U.S. at 430, 82 S.Ct. at 1266–67, 8 L.Ed.2d 607. The Court then reiterated this principle in *Schempp*, stating that the constitutional defect of the religious exercises involved was not "mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause." 374 U.S. at 224–25, 83 S.Ct. at 1573, 10 L.Ed.2d at 859. The result is the same even though Jefferson Parish students must affirmatively request to participate in the prayer observance, for an Establishment Clause violation does not depend upon the presence of actual governmental coercion. *See Schempp*, 374 U.S. at 223, 83 S.Ct. at 1572, 10 L.Ed.2d at 858; *Engel*, 370 U.S. at 430, 82 S.Ct. at 1267, 8 L.Ed.2d at 607. Because section 17:2115(B) and the parish regulations promote an inherently religious practice, it violates the second prong of the test.

Third, the district court found that the statute, as implemented in the Jefferson Parish regulation, would not result in excessive governmental entanglement with religion. This finding was based on the provision for affirmative voluntary participation. As we have shown, this feature of the plan does not cure the constitutional infirmity.

[9] The Jefferson Parish program has yet to be put into effect. Thus, the nature and extent of state involvement in religious activity is in some measure speculative at this time. What is certain is that the statute itself makes inappropriate governmental involvement in religious affairs inevitable. Louisiana makes school attendance compulsory for children seven to sixteen years of age. La.Rev.Stat. § 17:221(A) (1981). The morning exercises take place on school property during regular school hours. The statute authorizes the classroom teacher to conduct the prayer observance, requiring him to select among any student volunteers and allowing him to pray if no student wishes to pray. The teacher must monitor the daily classroom activities and enforce the one minute time limitation. Moreover, school authorities have a statutory duty to supervise the implementation of the prayer program in order to guarantee that all participation would remain purely voluntary. It is clear that "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." *Lemon v. Kurtzman*, 403 U.S. at 620–21, 91 S.Ct. at 2115, 29 L.Ed2d at 760. Because section 17:2115(B) and the Jefferson Parish procedures necessarily entail excessive governmental entanglements with religious activity, they violate the third prong of the test.

[10, 11] The district court expressed concern that striking down this public school prayer program would reflect a hostile attitude toward prayer and religion. This sort of self-created validation is unwarranted. *See Engel*, 370 U.S. at 433-35, 82

quiry. As the Supreme Court said in *Engel*, "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause . . . ." 370 U.S. at 430, 82 S.Ct. at 1266–67, 8 L.Ed.2d 607. The Court then reiterated this principle in *Schempp*, stating that the constitutional defect of the religious exercises involved was not "mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause." 374 U.S. at 224–25, 83 S.Ct. at 1573, 10 L.Ed.2d at 859. The result is the same even though Jefferson Parish students must affirmatively request to participate in the prayer observance, for an Establishment Clause violation does not depend upon the presence of actual governmental coercion. *See Schempp*, 374 U.S. at 223, 83 S.Ct. at 1572, 10 L.Ed.2d at 858; *Engel*, 370 U.S. at 430, 82 S.Ct. at 1267, 8 L.Ed.2d at 607. Because section 17:2115(B) and the parish regulations promote an inherently religious practice, it violates the second prong of the test.

Third, the district court found that the statute, as implemented in the Jefferson Parish regulation, would not result in excessive governmental entanglement with religion. This finding was based on the provision for affirmative voluntary participation. As we have shown, this feature of the plan does not cure the constitutional infirmity.

[9] The Jefferson Parish program has yet to be put into effect. Thus, the nature and extent of state involvement in religious activity is in some measure speculative at this time. What is certain is that the statute itself makes inappropriate governmental involvement in religious affairs inevitable. Louisiana makes school attendance compulsory for children seven to sixteen years of age. La.Rev.Stat. § 17:221(A) (1981). The morning exercises take place on school property during regular school hours. The statute authorizes the classroom teacher to conduct the prayer observance, requiring him to select among any student volunteers and allowing him to pray if no student wishes to pray. The teacher must monitor the daily classroom activities and enforce the one minute time limitation. Moreover, school authorities have a statutory duty to supervise the implementation of the prayer program in order to guarantee that all participation would remain purely voluntary. It is clear that "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." *Lemon v. Kurtzman*, 403 U.S. at 620–21, 91 S.Ct. at 2115, 29 L.Ed2d at 760. Because section 17:2115(B) and the Jefferson Parish procedures necessarily entail excessive governmental entanglements with religious activity, they violate the third prong of the test.

[10, 11] The district court expressed concern that striking down this public school prayer program would reflect a hostile attitude toward prayer and religion. This sort of self-created validation is unwarranted. *See Engel*, 370 U.S. at 433-35, 82

adopt or repeal tax exemption for church property. Likewise, a public school can choose to prohibit or allow the uttering of audible prayers by students. The Establishment and Free Exercise Clauses are bounds within which governments are free to move in their activities which effect religion. A governmental body oversteps the Establishment Clause by adopting legislation which violates one of three tests. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion (citation omitted); finally, the statute must not foster 'an excessive govermnent entanglement with religion.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

These tests are not rigid. The language used to state the tests betrays considerable flexibility. The second test does not prohibit a statute from having an effect of advancing religion, unless advancing religion is the statute's, "principal or primary" effect. The last test does not prohibit governmental entanglement with religion, but only that entanglement which is "excessive." The constitutional line of separation between church and state, "far from being a 'wall.' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614, 91 S.Ct. at 2112.

The challenged legislation satisfies all of the three criteria of the Establishment Clause. The legislative purpose of the challenged program was to provide religious freedom, a purpose no

more religious than the First Amendment. Furthermore, the challenged legislation has the primary effect of advancing not religion, but religious freedom. And it does so without excessive governmental entanglement with religion.

A.

This legislation does not violate the first criterion of the Establishment Clause. This legislation has a secular legislative purpose.

I agree that the District Court was clearly in error in finding that the purpose behind the challenged legislation was to provide a mechanism by which children could learn about beliefs different from their own, focus on spiritual aspects of human nature, and thereby develop an increased regard for themselves and their peers. I also agree that prayer is an inherently religious exercise. There is no doubt in my mind that the challenged legislation was the direct result of pressure from parents who want their children, at the beginning of each school day, to have an opportunity to formally and audibly recognize the existence of, and seek the benevolence of, a supreme being. It seems clear to me that the purpose behind the challenged legislature was to provide students with the freedom to engage in a religious exercise, opening their school day with an audible prayer.

But it seems to me that this is a perfectly legitimate, secular purpose. Providing the freedom to engage in religious exercises

is the purpose of the Free Exercise Clause of the First Amendment. It can surely not be argued that the First Amendment has a religious purpose. The purpose of the challenged legislation it to provide students with a small portion of the religious freedom which they are guaranteed outside the classroom. School attendance is, after all, compulsory in Louisiana. Compulsory school attendance forces many students into public schools, thereby unavoidably curtailing their freedom to engage in religious exercises. For Louisiana to reduce its restraint on student's religious freedom is perfectly legitimate.

If a student's religion required him or her to utter an audible prayer at the beginning of each school day, the Free Exercise Clause would require the school to accommodate that requirement. Unfortunately for the students who would have participated in the program in this case, their religion did not require them to utter such an audible prayer, even though their religion apparently encouraged it sufficiently for their parents to petition the state legislature to provide for the allowance of such an audible prayer. I do not read the Establishment Clause to prohibit all audible public school prayer which the Free Exercise Clause does not protect. "[I]t is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with our 'happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.' " *Gillette v. United States*, 401 U.S. 437, 453, 91 S.Ct. 828, 838, 28 L.Ed.2d 168 (1971). "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Commission of New York*,

397 U.S. 664, 673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970

Louisiana and the Jefferson Parish School Board have not a tempted to establish a religion; rather, they have attempted t provide religious freedom.

B.

Nor does it seem to me that this legislation violates the se ond criterion of the Establishment Clause. The primary effe of the challenged legislation is neither to advance nor to inhib religion, but rather to advance religious freedom.

There are only three ways in which a state could possibl treat audible prayer in public schools: require it, allow it, prohibit it. Requiring it would be an elementary violation the Establishment Clause. But it seems to me that the sta should be allowed to choose between allowing audible pray and prohibiting it. Compared to each other, allowing audib prayer inhibits religion. Prohibiting audible prayer may ha the effect of inhibiting religion, but does not violate the Esta lishment Clause because prohibiting audible prayer has the p mary effect of enabling the school to conveniently maintain o der. Allowing audible prayer may have the effect of advanci religion, but (when the government does not establish the pra er's content) does not violate the Establishment Clause becau allowing audible prayer has the primary effect of promoting r ligious freedom.

Not every law which incidentally benefits religion violates this second criterion of the Establishment Clause. Even in cases where the government provides financial aid to schools with religious affiliation, the obvious benefit to religion does not render the program violative of the Establishment Clause.

> Whatever may be in its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. E.g., *Bradfield v. Roberts*, 175 U.S. 291, 20 S.Ct. 121, 44 L. Ed. 168 (1899); *Wasz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). Stated another way the Court has not accepted the recurrent argument that all aid if forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

*Hunt v. McNair*, 413 U.S. 734, 742–43, 93 S.Ct. 2868, 2873-74 37 L.Ed.2d 923 (1973). An incidental benefit to religion is irrelevant if the challenged legislation has a legitimate primary or principle effect.

A program of voluntary religious exercise does not have the primary effect of advancing religious freedom if the government establishes the substantive content of the exercise. Such a program has the primary effect of advancing a state religion. Thus, the Supreme Court has ruled that "each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people who choose to look to the religious for guidance." *Engel v. Vitale*, 370 U.S. 421, 435, 82 S.Ct 1261, 1269, 8 L.Ed.2d 601 (1962); Accord,

*School District of Abington Twp. Pa., v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (State required opening of school day with Bible reading, giving students the option of absenting themselves.); *See also, Stone v. Graham*, —— U.S. ——, 101 S.Ct. 192, 66 L.Ed. 199 (1980) (State required classroom posting of Ten Commandments.); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct1 92, 66 L.Ed.2d 228 (1968) (State prohibited teaching evolution). Government is not allowed to concern itself with determining the legitimacy of the substantive content of the practices or teachings of religions or non-religious world views. Voluntariness is utterly irrelevant when the challenged legislation establishes the substantive content of a religious activity. Such legislation has the primary effect of advancing not religious freedom, but a state religion.

Likewise, a government's lack of concern with substantive content is irrelevant when the challenged legislation provides for involuntary programs which benefit religion. Thus coercive "release time" programs for religious training violate the Establishment Clause even when the government does not concern itself with the content of the religious teaching. In *McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), the Supreme Court said,

> The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious

> council on promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.
>
> Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

333 U.S. at 209-12, 68 S.Ct. at 464-65. *Cf. Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L.Ed. 954 (1952) (Non-coercive "release time" program, for religious training off of school premises, does not violate the Establishment Clause). Government is not allowed to use its coercive power for the benefit of religions. That the government is unconcerned with the substantive content of the religions it is benefitting is utterly irrelevant when the challenged legislation invokes the government's coercive power to benefit religions. Such legislation has the primary effect of advancing not religious freedom, but religion.

But, where the legislatively created program is both vol-

untary and without substantive content, it can have the primary effect of advancing neigher a state religion nor religion in general, but religious freedom. The legislation in this case has the primary effect of advancing religious freedom. This is not a case where tax-supported public school property is used to aid religious groups to spread their faith to students coerced into attending classes in religious instruction. This is not even a case where tax-supported public school property is used to aid religious groups to spread their faith to students who voluntarily participate. In this case, students coerced into attending public schools are allowed to engage in a religious activity the contents of which they themselves deter - mine. As the Supreme Court has said,

> [I]t is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion" (citation deleted), and even though it does not aid one religion more than another but merely benefits all religions alike. (citation deleted) It is equally established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions is, for that reason alone, constitutionally invalid. (citations deleted). What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects.

*Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 771–72, 93 S.Ct. 2955, 2964–65, 37 L. Ed.2d 948 (1973). It does not seem to me that this legislation furthers any of the evils against which the Establishment Clause protects.

The primary effect of the challenged legislation is not to advance religion; rather, the primary effect is to advance religious freedom.

C.

Finally, this legislation does not violate the third criterion of the Establishment Clause. The government entanglement with religion which is fostered by the challenged legislation is hardly excessive; it is *de minimus*. The program established by the challenged legislation is necessarily conducted on public school property, but the amount of time involved does not materially affect the educational function of the school. The state limits the time period to five minutes, and Jefferson Parish limits the time period to one minute. School officials' monitoring of the program to guarantee voluntariness, to enforce time limitations, and to choose among student volunteers simply does not raise the level of the government's entanglement to "excessive."

If some students wish to open their school day with an audible pray, an indisputably religious activity, it seems to me that the Consitution does not prohibit them from doing so.

Teachers are, at least from the perspective of the students, government officials *C.F. Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (Teachers have First Amendment rights which must be considered in the

area of labor relations.) It is troubling that this legislation expressly allows teachers to offer audible prayer, because there is a danger that from this provision teachers would infer authority to conduct the prayer period in a manner which violates the Establishment Clause. But teachers are aware of the Establishment Clause restraints placed on them by their status as government officials. And not every prayer uttered by a government official violates the Establishment Clause. Otherwise the Constitution would prohibit, for example, the perfunctory invo- entirely different from the case now before this Court. There is, of course, no record on which to determine the existence of any such abuse, because the legislative program was never put into effect. The case before this Court now is a challenge to the legislation on its face. On its face, the legislation does not authorize teachers to violate the Establishment Clause.

It is my opinion that the challenged legislation has the legitimate, secular, purpose and effect of providing religious freedom, with minimal governmental entanglement with religion. It is my opinion that the challenged legislation is constitutional. I would affirm the decision of the District Court.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

KAREN B, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, ET AL — CIVIL ACTION NO. 80-4774

VERSUS

DAVID TREEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA, ET AL — SECTION "H"

filed: Jan. 8, 1981
Received: Jan. 12, 1981

Reasons for Judgment dictated in open court in the above-captioned matter on Wednesday, December 17, 1980, the Honorable ADRIAN G. DUPLANTIER, Judge, presiding, at the conclusion of the trial, and thereafter edited and supplemented by the court.

APPEARANCES

For the Plaintiffs:

AMERICAN CIVIL LIBERTIES UNION OF LA.
By: Carole B. Shauffer
606 Common Street
New Orleans, Louisiana 70130

For the defendant, David Treen,

Patricia Bowers
234 Loyola Avenue
New Orleans, Louisiana 70112

For the defendant, Jefferson Parish School Board, et al:

Jack A. Grant, Esq.
220 Lavoisier Street
Gretna, Louisiana 70053

Reported By: O.J. Robert, Jr., CSR
Official Court Reporter

## REASONS FOR JUDGMENT

In its 1980 Regular Session, the Louisiana Legislature enacted Act 519 amending and reenacting Louisiana Revised Statues Title 17, Section 2115 as follows:

> *Be it enacted by the Legislature of Louisiana:*
> Section 1. Section 2115 of Title 17 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:
> § 2115. Silent meditation; prayer
> A. Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportuntiy, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent mediation, which shall not exceed five minutes. The bried time of silent mediation shall not be intended or identified as a religious exercise.
> B. A school board also may authorize the proper school authorities of each school under its jurisdiction to allow each classroom teacher to ask if a student wishes to volunteer to offer a prayer and, in the event no student does volunteer, to allow the teacher to offer a prayer. In no event shall any prayer last longer than five minutes. In no case may a student or a teacher be required to offer a prayer. Upon the objection of a student in the classroom or upon written objection of a parent or legal guardian of a student made to the principal or other proper school authority, that student shall not be required to participate or be present in the classroon during the time a prayer is being offered.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid, provisions items or applications, and to this end the provisions of this Act are hereby declared severable.

> Section 3. All laws or parts of laws in conflict herewith are hereby repealed.
>
> Approved July 23, 1980.

Each parish (county) in Louisiana elects a school board, which is charged with the duty of administering the public school system. Jefferson Parish, adjacent to New Orleans, is one of the most populous Louisiana parishes. On December 3, 1980, the Jefferson Parish School Board resolved to implement the new statute. (Copies of the School Board resolution and the letter advising parents of the program are attached as an appendix.)

Plaintiffs, parents of children who attend the public schools of Jefferson Parish, filed action seeking injunctive relief and a declaratory judgment, contending that the prayer portion of the state statute[1] and the implementing resolution of the Jefferson Parish School Board are unconsitutional under the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 8 of the Louisiana Constitution.

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. U.S. Amend. 1.
>
> No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof. La.State Const., Art.1, Sec. 8.

---

1. Plaintiffs do not attack La.R.S. 17:2115(A), which authorizes a meditation session.

The court declined to issue a temporary restraining order on the ground that none was necessary, since the trial was scheduled, both on the application for a preliminary injunction and on the merits pursuant to FRCP 65 (a) (2), on December 17, 1980, the day before the school board would first implement the program.

Plaintiffs produced expert and lay testimony regarding the religious nature and effect of the prayer program proposed by the Jefferson Parish School Board. Their witnesses asserted that implementation of the prayer program would inevitably have religious repercussions and therefore was violative of the Establishment Clause of the First Amendment.

Defendants offered the testimony of the Louisiana State Senator who introduced the bill in the legislature, the member of the House of Representatives who was its chief sponsor in the House, and the member of the Jefferson Parish School Board who sponsored the implementation resolution. Their testimony was to the effect that the proposed program was designed to promote secular purposes and, due to its voluntary and neutral nature, would not result in the establishment of religion.

At the conclusion of the trial, the court ordered judgment dismissing plaintiffs' suit on the gound that the Louisiana statute and implenenting ordinance do not violate the federal or state constitutions. The court ordered an injunction to be issued pending an appeal in order to maintain the status quo, and gave

the following reasons for judgment orally from the bench.[2]

PROCEEDINGS

THE COURT:

I'm prepared to rule now. I have read all of the memoranda, the authorities that you submitted to me, the depositions filed earlier, and I decide to rule now, having thought about it since 4 o'clock this morning. I really believe that the quality of justice that I can render is best served if I decide the case now, rather than take it under advisement, for a number of reasons.

First of all, I'm not ever going to know anymore than I know --- not that that's very much -- and I have been blessed -- excuse the term -- by competent counsel who have cooperated throughout the two week period since the case has been filed. Plaintiffs submitted a complete memorandum at the outset, with their complaint. Defendants also submitted a memorandum promptly. Thus the parties have given me the benefit of their research well in advance of trial.

Therefore, all of the prerequisites for a prompt decision in the case are met. We don't always have that situation.

And I don't have to say that I have thought a great deal about the issues in this case and "prayed over it," I might say. Indeed, I have done very little else in my spare time since this case was filed.

---

2. The oral reasons have been edited.

It's an important case, also, and that's another reason that I don't want to delay its resolution. Both parties have told the Court that in any event, whichever way I decide the matter, it is going to be appealed. In a sense, the primary function that we serve at this point is to permit the parties to make a record and to serve as a conduit for that appellate process which will ultimately resolve the issue.

I recognize of course that my responsibility is nonetheless great. I don't have to tell you that a case such as this is difficult for a court, particularly for a single-judge court; it gets lonely. It is even more difficult where there are well-meaning, sincere people on both sides of the issue who hold very strong, diametrically opposed views, people for whom I have a great deal of respect.

This would be a simple case if there were a controlling precedent either in the United States Supreme Court or in the Fifth Circuit. I would then have a duty (notwithstanding what I might conclude is the meaning of the constitution) to follow that controlling precedent. I have found no such precedent. Counsel on both sides have agreed that there is no case precisely on point, indeed, none that is very close factually to this one. Both sides argue from the cases that have been decided that this one ought to be controlled by this pronouncement or that one in previous decisions.

I should say at this point, before giving any further reasons,

that I propose to do two things. I hold that the Louisiana statute, as the Jefferson Parish School Board proposes to implement it, does not violate the United States Constitution or the Louisiana Constitution. However, I will grant injunctive relief pending appeal under Rule 62(c), having determined that the equities weigh in favor of having a final judicial determination made before implementation of the statute.

The issue is a very serious one, and there are people who, based upon their testimony, perceive serious detriment to themselves if the statute is implemented. Moreover, no serious detriment will result to the school system if I stay the implementation of the statute pending appeal. It has been nearly six months since the statute went into effect, during which it has not yet been implemented.

It is difficult to articulate the reasons why I conclude that the statute is consitutional. I sum up my conclusion when I observe that when the United States Supreme Court held that a public school could not display the Ten Commandments, in my view the Court did not enact an Eleventh Commandment, "Thou shall not ever pray in the public school."

The Supreme Court decisions upon which the plaintiffs rely do not extend so far as to ban all prayer from public schools. A careful analysis of these cases reveals that the focus has been on the presentation of prayer programs which are oriented towards particular religious views as opposed to the totally neutral position adopted by the statute at issue. In the

seminal case of *Engel v. Vitale*, 82 S.Ct. 1261, the Court h
that the recitation in public schools of a specific prayer co
posed by state officials violated the constitutional prohibit
against laws respecting the establishment of religion. In *Sch*
*District of Abington Township, Pennsylvania v. Schemp* and
companion case, *Murray v. Curlett*, 83 S.Ct. 1560, the Co
banned the broadcasting over the school communication syst
of verses of the Bible and recitation of the Lord's Prayer. Cit
*Schemp* as its only authority, in *Chamberlain v. Dade Cou*
*Board of Public Instruction*, 84 S.Ct. 1273, the Court, in a p
curiam opinion, enjoyed devotional Bible readings and the
citation of the Lord's prayer in Florida's public schools. In
most recent pronouncement, the Court prohibited the posti
of a copy of the Ten Commandments in public school cla
rooms. *Stone v. Graham*, 49 LW 3369.

The common factual thread which runs through this line
cases is the attempted implementation of programs which are n
only distinctly religious but which focus upon the tenets
particular religions. The specific prayer in *Engle*, the Lor
Prayer, the Bible, and the Ten Commandments all reflect p
spectives peculiar to the Judeo-Christian religious traditio
Public school programs which offer these particular princip
to the children exclusive of others have the effect of establis
ing religions. The same cannot be said of Jefferson Parish's pr
posed program, which neutrally offers prayer of any type, a
thus does nothing to establish religion in contravention of t
First Amendment.

In the absence of any controlling precedent, we apply the rationale of the Supreme Court in its disposition of cases involving the Establishment Clause. A three-part test for determining the consitutionality of state laws under the Establishment Clause has been articulated. The statute must have a secular legislative purpose: its principal or primary effect must not advance or inhibit religion; and the statute must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Stone v. Graham*, 49 L.W. 3369 (1980).

The testimony of two legislators who were primarily responsible for the state statute and a school board member who sponsored the implementation resolution in Jefferson Parish stressed that the purpose behind the program is to provide a mechanism by which children could learn about beliefs different from their own, focus on spiritual aspects of human nature, and thereby develop an increased regard for themselves and their peers. The neutral, non-denominational nature of the proposed program was emphasized as proof of it secular purpose.

The court finds that the program proposed by Jefferson Parish does not promote or inhibit religion. The students and the teacher have the opportunity to give a "prayer" in the one minute provided. That "prayer" can relate to anything from sports to the weather to religion; the student or teacher who volunteers is merely given the opportunity to say something for one minute on any topic. It may relate to religion, but it also may be nonreligious.

Finally the totally neutral and voluntary nature of the proposed prayer prevents any possibility of government entanglement in religion. The affirmative steps which the parents and the children must take before the children will be permitted to participate in the program neutralize any appearance of government influence.

I know the plaintiffs' position is that there is no such thing as a voluntary program of prayer, but I must say that I can not conceive of a statute of a program of implementation that would be less involuntary. The statute itself at the state level puts it on a local option basis. The Jefferson Parish School Board states that the statute can be implemented or not in the judgment of the school. And then, the parents and children are given the greatest leeway possible. In order not to participate in the brief prayer or meditation session, a parent doesn't have to opt out of it; one must opt in before the student can participate.

All of the reported decisions that I know about involve situations in which a parent or student who does not wish to participate, must so indicate; otherwise, the student will be part of it.

I just can not conclude that the First Amendment goes so far as to prohibit state government, and then a locally elected school board, from permitting a teacher who wishes to participate, and students who wish to do so, to volunteer a one minute non-denominational prayer. Although I respect the views of those who believe to the contrary, I cannot conclude that such an exercise can cause hostility toward "other" religions or

that it can seriously interfere with the right of parents to teach their children the religion of their preference. My own view is that the program will promote tolerance, and not intolerance, among most people who participate, and that it will produce some knowledge and understanding of the religious virtues and practices of others, in place of ignorance thereof.

In any event it is not for this court to determine whether valid purposes or goals of a school board program are likely to succeed or not; that is a judgment call to be made by those elected to run the school system, not by a federal court.

To hold that this statute, as it is to be implemented in Jefferson Parish, is unconstitutional would be to hold, in effect, that the United States Constitution forbids any prayer whatsoever in a public school, and indeed, in any public place or at any state function. In my view, to hold that the Constitution so forbids prayer is to say that the Constitution expouses non-prayer or that it is hostile to prayer.

If the Constitution prohibits those who believe in prayer from praying a prayer (not *the* state-selected prayer), a prayer volunteered by different students or by a teacher in a public school, then the Constitution impliedly teaches children that there is something wrong with prayer.

I recognize that the program can possibly be abused by some teachers, and under some circumstances. I think practically

every public program, every public activity, can be abused. Teachers of civics can abuse their privilege of teaching government. as properly administered -- that is how I must view it -- I can't see the statute as violative of either the State or the United States Constitution. If it is improperly administered, then, of course, that can be stopped and should be.

I sum up by saying that in my view the Constitution guarantees freedom *of* religion, but should not be construed to guarantee freedom *from* religion. The views of minorities must be protected from unconstitutional intrusion. But I hope we never reach the point that whatever the vast majority of our citizenry espouses must *a fortiori* be unconsitutional.

For the foregoing reasons, there will be judgment dismissing plaintiffs' suit and declaring the statute and its proposed implementation constitutional.

Januray 8, 1981

/S/ Adrian G. Duplantier

UNITED STATES DISTRICT JUDGE

EXCERPT FROM THE MINUTES OF THE JEFFERSON PARISH SCHOOL BOARD MEETING HELD ON DECEMBER 3, 1980

APPENDIX

Moved by Mr. Brainis, seconded by Mr. Speeg that the guidelines for student participation in prayer and silent meditation be as follows:

A. When supervision of students not participating in prayer is not considered a problem in the judgment of the school administrator, the following schedule will be implemented:

1. The school day will begin at the regular time.
2. The first minute at the start of the day will be for prayer participants, excluding the students not wishing to participate. These students may report to class and remain seated and quiet or may remain outside the classroom where they will be supervised. Each classroom instructor will ask if any student wishes to volunteer to offer a prayer, and, in the event no student does, the teacher may do so. Should the teacher choose not to volunteer a prayer, the the monent of silent mediation will be observed at this time. In any case, the period for a voluntary prayer to be offered will not last more than one minute.

3. After the minute of prayer, all students will report to class for a minute of silent meditation.

B. When supervision of students not participating in prayer is considered a problem in the judgment of the school administrators, the following two options will be available for implementation:

Option 1

1. A centralized location will be established, when feasible, for prayer participants, starting the school day for them sufficiently early to allow students to arrive at the location and participate in a minute of prayer.

2. All students report to classrooms when regular bell rings and participate in minute of silent meditation.

Option 2

1. The bell will ring sufficiently early to allow prayer participants to report to classrooms for a minute of prayer.
2. All students report to classrooms when regular bell rings and participate in minute of silent meditation.

The voting was as follows:

YEAS: Mr. Brainis, Mrs. Haynes, Mr. Speeg, Mr. Toomy, Mr. Verigan, Mrs. Clesi

NAYS: None

REPORTING LATE: Mrs. Hassenboehler and Mr. Valence

The motion carried.

CERTIFIED TO BE A TRUE COPY:

/S/ Lawrence J. Sisung /AC

Lawrence J. Sisung, Secretary

Jefferson Parish Public School System
519 Huey P. Long Avenue
Gretna, Louisiana 70053

Dear Parent,

The Jefferson Parish School Board, at a meeting held on August 13, 1980 authorized and recommended that each principal in the system establish a moment of prayer and silent meditation at the beginning of each school day as recently established by state law as follows:

A. Each parish and city school board in the State shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent meditation, which shall not exceed five minutes. The brief time of silent meditation shall not be intended or identified as religious exercise.

B. A school board also may authorize the proper authorities of each school under its jurisdiction to allow each classroom teacher to ask if a student wishes to volunteer to offer a prayer and, in the event no student does volunteer, to allow the teacher to offer a prayer. In no event shall any prayer last longer than five minutes. In no case may a student or a teacher be required to offer a prayer. Upon the objection of a student in the classroom or upon written objection of a parent or legal guardian of a student made to the principal or other proper school authority, that student shall not be required to participate or be present in the classroom during the time a prayer is being offered.

In accordnce with this policy, the Jefferson Parish School System will establish a one minute period of prayer and a one minute period of silent meditation as the first activity of the day at our schools. All students will participate in a minute of silent meditation, but those students who will participate in a minute meditation, but those students who do not wish to participate

or whose parents do not request them to participate in a moment of prayer will be excused from this activity.

Should you want your son/daughter to participate in prayer it will be necessary that you complete the form at the end of this letter and return his/her school by . However, if the student does not verbally request to participate, the student will not be allowed to participate.

| Joseph F. Toomy<br>District One | Andy Valence<br>District Three | Mrs. Gilda P. Haynes<br>District Five | Leon I. Brainis<br>District Seven |
|---|---|---|---|
| Donalyn Hassenboehler | Georgia L. Clesi | Raymond D. Speeg | Terry Verigan |

Without signed parental request and verbal student request, no student will be included in this activity.

Your cooperation and that of all parents is, as always greatly appreciated.

Respectfully,

Larry J. Sisung
Superintedent

LJS/nr

---

If you desire to have your son/daughter avail himself/herself of the opportunity to participate in a moment of prayer please check below and return to the school by

_____ I want my son/daughter _____ to participate in a moment of prayer.

Date _____ Parent's Signature _____

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term 19

No. 80-4003

D.C. Docket No. CA 80-4774 "H"

KAREN B., ET AL.,
Plaintiffs-Appellants,

versus

DAVID TREEN, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before CHARLES CLARK and RANDALL, Circuit Judges, and SHARP*, District Judge.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana and was argued by counsel;

* District Judge for the Northern District of Indiana, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court for proceedings not inconsistent with this opinion;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

AUGUST 5, 1981

SHARP, District Judge, Dissenting

ISSUED AS MANDATE- Aug 28 1981

D-1

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

---

NO. 80-4003

---

received: Sept. 18, 1981
filed: Sept. 18, 1981

KAREN B, et al,
Plaintiffs

VERSUS

DAVID C. TREEN, ET AL
Defendants

NOTICE OF APPEAL

I. Notice is hereby given that David Treen, individually and in his official capacity as Governor of the State of Louisiana and Jefferson Parish School Board and Larry J. Sisung, individually and in his office capacity as superintendent of the schools of Jefferson Parish, the defendants above named, hereby appeal to the Supreme Court of the United States from the final judgment and opinion rendered in this action on August 5, 1981.

This appeal is taken pursuant to 28 U.S.C. 1254.

II. The Clerk will please prepare a transcript of the complete record in this case, both in the Eastern District of Louisiana and the Fifth Circuit Court of Appeals for transmission to the Clerk of the Supreme Court of the United States.

Sincerely yours,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY
GENERAL

/S/ Jack A. Grant

JACK GRANT
JEFFERSON PARISH
SCHOOL BOARD
220 LAVOISIER STREET
GRETNA, LOUISIANA
70053

/S/ Patricia Nalley Bowers

PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY
GENERAL
LOUISIANA DEPARTMENT OF
OF JUSTICE
234 LOYOLA AVENUE,
7TH FLOOR
NEW ORLEANS, LOUISIANA
70112
PHONE: (504)568-5575

I, Patricia Nalley Bowers, attorney for the State of Louisiana, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1981, I served copied of the foregoing Notice to Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

Ms. Carole B. Shauffer
American Civil Liberties Union of Louisiana
606 Common Street
New Orleans, Louisiana 70130

Mr. Franklin Terry
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, California 9005

Mr. Jonathan M. Lake
755 Carondelet Street
New Orleans, Louisiana 70130

Mr. Donald R. Mintz
Attorney-at-Law
P.O. Box 2000
New Orleans, Louisiana 70176

Mr. Nathan Z. Dershowitz
15 E. – 84th Street
New York, New York 10028

Jack A. Grant
Attorney-at-Law
220 Lavoisier Street
Gretna ,Louisiana 70053

By:/S/ Patricia Nalley Bowers

PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY
GENERAL

PNB/mw

Office - Supreme Court, U.S.
FILED
JAN 5 1982
ALEXANDER L. S...

NO. 81 - 1031

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KAREN B. ET AL

Appellees

VERSUS

DAVID TREEN, ET AL

Appellants

APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

# MOTION TO AFFIRM

CAROLE B SHAUFFER
AMERICAN CIVIL
LIBERTIES UNION OF
LOUISIANA
1663 MISSION STREET
FIFTH FLOOR
SAN FRANCISCO,
CALIFORNIA 94103
PHONE (415) 543-3379

Attorney for Appellees
Karen B., Phyllis S.
and Gary G.

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I | Statement | 2 |
| II | Argument | 5 |
| | A. Appellants' First Question Is not Presented by the Facts of this Case | 5 |
| | B. Appellants' Second Question Raises an Issue that has Been Clearly Resolved by this Court | 9 |
| | C. Appellants' Third Question Raises An Issue That Has Been Clearly Resolved by Earlier Decisions of this Court | 11 |
| | D. Conclusion | 14 |

## TABLE OF AUTHORITIES

Page

Constitutional Provisions

United States

Constitution Amendment I.....9

Statutes

La.Rev.Stat,§17:2115(B)(1981)....1

Cases

Brandon v. Board of Education, 635 F.2d 971 (2nd Cir. 1980) petition for cert. filed 50 U.S.L.W 3079 (U.S. Feb. 17, 1981) (No. 80-1396).....7

Chamberlain v. Dade County Board of Public Instruction, 377 U.S. 402 (1964).....13

Chandler Unified School District v. Collins, 644 F.2d 759 (9th Cir. 1981) cert. den. 50 U.S.L.W. 3212 (Oct. 5, 1981).....11

Engel v. Vitale, 370 U.S. 421 (1962).....9,12,13

Karen B, et al v. David Treen, et al, 653 F2d 897 (5th Cir. 1981).....4

Lemon v. Kurtzman, 403 U.S. 602 (1971).....10

School District of Arlington Township v. Schempp, 374 U.S. 203 (1963).....9,12,13

Stone v. Graham, 449 U.S. 39 (1980) .....10

Torcaso v. Watkins, 367 U.S. 488 (1961).....12

Waltz v. Tax Commission of the City of New York 397 U.S. 664 (1970).....10

Widmar v. Vincent, _____ U.S. _____ 50 U.S.L.W. 4062 (Dec. 8, 1981).....7,11

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1981
No. 81 - 1031

KAREN B. ET AL
Appellees

VERSUS

DAVID TREEN, ET AL
Appellants

APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the grounds that the questions are so insubstantial as not to warrant further argument.

## STATEMENT

This is an appeal from a judgment of the United States Court of Appeals for the Fifth Circuit, holding that La.Rev.Stat. §17:2115(B)(1981), a statute authorizing the offering of prayer in the public schools at the beginning of the school day, is unconstitutional, and that a prayer program adopted pursuant to that statute by the Jefferson Parish School Board is also unconstitutional.

In 1980, the Louisiana Legislature enacted La.Rev.Stat. §17:2115(B)(1981). That statute authorizes local school boards to permit the offering of up to five minutes of oral prayer at the beginning of the school day by either a teacher or a

student. On December 3, 1980, the School Board of Jefferson Parish adopted a program to implement that statute. Under that program, the first minute of the school day is devoted to prayer. The teacher selects a student to offer the prayer, or in the absence of volunteers offers the prayer. Students who do not choose to participate in the program are supervised outside the classroom.

On December 4, 1980, three parents sued on behalf of themselves and their children attending Jefferson Parish Public Schools for declaratory and injunctive relief against the operation of the program and the statute. By agreement, implementation of the program was delayed pending a

decision by the Federal District Court for the Eastern District of Louisiana.

On December 17, 1980, a trial on the merits was held. The District Court issued a bench decision dismissing plaintiff's suit on the grounds that that the prayer program did not violate the Constitution. He also issued an injunction pending appeal against implementation of the program. On January 8, 1981 the District Court filed written "Reasons for Judgment."

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. The appeal was heard on an expedited basis, and, on August 5, 1981, the Fifth Circuit reversed the decision of the District Court. Karen

B., et al v. David Treen, et al, 653 F2d.897 (5th Cir. 1981).

Defendants David Treen, Larry Sisung and the Jefferson Parish School Board filed Notice of Appeal to this Court on Spetember 18, 1981.

The prayer program has never been implemented.

## ARGUMENT

### A. Appellants' First Question Is not Presented By The Facts Of This Case.

Appellant's first question on appeal is:

> Does the denial of use of public school facilities for voluntary prayer before the mandatory segment of the school day begins deny the rights to free speech, equal protection and religious freedom to

> those who wish to participate?
> (Jurisdictional statement at i)

This question impliedly misstates the facts of this case in two ways. First, this case does not present a situation in which prayer is offered before the "mandatory" segment of the school day. Under the guidelines adopted by the Jefferson Parish School Board, and according to the statute, the school day starts, and all students are required to be present, before the prayer period. Some students may remain outside of the classroom or "prayer room", but they will be supervised by school personnel. The statute itself explicitly states that the "first five minutes of the school day" may be

devoted to prayer. Indeed, Appellants acknowledge the fact that the prayer period is part of the mandatory school day in their third question on appeal. This question describes the program as occurring "at the beginning of the school day." (Jurisdictional Statement at i-ii)

Second, the issue of the denial of the use of public shcool facilities for voluntary prayer is not presented by this case. The facts of this case do not resemble those in Brandon v. Board of Education 635 F.2d 971 (2nd Cir. 1980) petition for cert. filed 50 U.S.L.W. 3079 (U.S. Feb. 17, 1981) (No. 80-1396) or Widmar v. Vincent _____ U.S. _____ 50 U.S.L.W. 4062 (Dec. 8, 1981) in which groups of

students asked to use school property for a prayer meeting and were refused. On the contrary, in this case, the school board itself designed, intends to supervise, and even lead the prayer sessions. The sessions were set up under the sponsorship of local government rather than at the request of student participants. There is absolutely no evidence in the record that any group of students ever asked for these prayer sessions.

Apparently appellants intend to argue that the Fifth Circuit's ruling constitutes a "denial of school facilities" to those students who would have chosen to participate in the prayer program. Following that reasoning, one would have to conclude that this Court's

decisions in School District of Arlington Township v. Schempp, 374 U.S. 203 (1963) and Engel v. Vitale, 370 U.S. 421 (1962) resulted in infringement on the free exercise rights of those students who wished to participate in the prayer programs challenged in those cases. This conclusion was clearly rejected by the Court in both cases.

B. Appellant's Second Question Raises an Issue that Has Been Clearly Resolved by this Court.

Appellants have no legal foundation for their suggestion that this Court abandon the test it has developed for evaluating violations of the Establishment Clause of the First Amendment to the United States Constitution. (Jurisdictional

Statement at 19). For eleven years, this Court has consistently followed the Waltz/Lemon test, Waltz v. Tax Commission of the City of New York, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971). No significant problems in applying that test have emerged. The test continues to reflect current legal views and is sufficiently flexible to meet the Court's present needs. In fact, Appellants only rationale for suggesting that the test be abandoned is the fact that they, and the author of a law review article, disapprove of it. (Jurisdictional Statement at 19-21)

This Court has recently reaffirmed the validity of the test, both last session in Stone v. Graham,

449 U.S. 39 (1980) and this session by denying certiorari in Chandler Unified School District v. Collins, 644 F.2d 759 (9th Cir., 1981) cert. den. 50 U.S.L.W. 3212 (Oct. 5, 1981) and in its opinion in Widmer v. Vincent ___U.S. _____ 50 U.S.L.W. 4062. Thus, Appellants' suggestion that the test should be modified does not merit further argument.

C. Appellants' Third Question Has Been Clearly Resolved by Earlier Decisions of This Court.

Appellants third and final question for review is:

> Would the use of public school facilities for voluntary prayer at the beginning of the school day violate the Establishment Clause

under the terms of the Waltz/Lemon test?

(Jurisdictional Statement at i-ii)

That question has been definitively answered by this Court in School District of Arlington Township v. Schempp, 347 U.S. 203 (1963) and Engel v. Vitale, 370 U.S. 421 (1962).

Appellants place great emphasis on the fact that the state has not selected a specific prayer or religious text to be recited by the students and teachers. This emphasis ignores the fact that the Establishment Clause prohibits not only the advancement of a particular religion, but the advancement (or inhibition) of religion in general. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

Appellants further argue that this case presents a substantial, previously unresolved question because participation in the prayer program is voluntary. However, participation in the prayer programs reviewed by this Court in Engel v. Vitale, supra; School District of Arlington Township v. Schempp, supra; and Chamberlain v. Dade County Board of Public Instruction, 377 U.S. 402 (1964) was also "voluntary" in the sense that students were not officially required to participate. Whether children who do not wish to participate first enter the classroom before or after a prayer has been recited is not relevant for purposes of analysis under the Establishment Clause. In either case, the school is

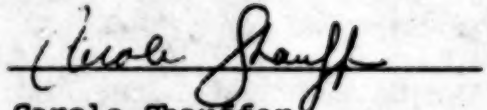
sponsoring and supporting a religious activity.

Neither the fact that the School Board has not selected a specific prayer nor the fact that the prayer is voluntary distinguish this program from other school prayer schemes held to be unconstitutional by this Court. Far from being "not even remotely applicable to the case at bar" as appellants contend (Jurisdictional Statement at 24), the cases previously decided are dispositive of the issues and mandate affirmance of the decision of the Court of Appeals for the Fifth Circuit.

D. Conclusion

Appellants have presented no questions that warrant further

argument. Accordingly, we respectfully submit that the judgment of the Fifth Circuit Court of Appeals should be affirmed.



Carole Shauffer
American Civil Liberties Union
of Louisiana
1663 Mission Street, 5th Floor
San Francisco, CA 94103
(415) 543-3379

## CERTIFICATE OF SERVICE

I Carole B Shauffer attorney for Karen B. et al. appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____ 1981, I served by mailing airmail, postage prepaid 3 copies of the foregoing Motion to Affirm on counsel for each appellant.

_____